DEPARTMENT OF JUSTICE

Statement

of

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Concerning

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Good morning, Mr. Chairman and members of the Committee. I am pleased to appear before you today to share the Justice Department's perspective on the mergers taking place in the telecommunications industry. These hearings are timely, as there is a significant amount of merger activity taking place in this industry. These mergers are being fostered not only by changes in the law and regulatory framework -- most notably the enactment of the Telecommunications Act of 1996 -- but also by the advent of new technologies and other dramatic changes taking place in the marketplace.

The last two years have witnessed mergers and alliances involving major players in the telephone, long-distance, media, and cable industries, including some of the largest and most prominent firms. These transactions, which affect consumers across the United States, often present novel and complex issues and need to be investigated carefully. As competition replaces regulation in the telecommunications industry, the merger and alliance activity is likely to continue, and vigorous antitrust enforcement is important if we want to continue to chart a path that will give rise to the important consumer benefits -- including lower prices, greater choices, higher quality, and more innovative product offerings -- that competition makes possible.

This is a challenging time for the Antitrust Division, and I want to talk about the Department's role in reviewing these mergers to ensure that they do not create or facilitate the exercise of market power and lead to increased prices, restricted consumer choice, or reduced innovation. As this Committee well knows, the Telecommunications Act not only preserved this important role, but also strengthened it by eliminating Section 221(a) of the Communications Act of 1934, which had immunized mergers between telephone companies from antitrust review if approved by the FCC. I want to thank this Committee once again for its instrumental help in securing that important change in the legislation.

I will also touch on how we interact with the FCC, the States, and increasingly, foreign antitrust authorities. We have benefitted greatly from interacting closely -- to the extent permitted by confidentiality laws -- with our colleagues at the FCC, with the State public utility commissions, with the State attorneys general, and with our foreign counterparts. The task of promoting and preserving competition in an industry that is emerging from regulation is an enormous undertaking, and active cooperation among governmental agencies at all levels that are involved in reviewing telecommunications mergers, within the limits of our confidentiality requirements, is of tremendous benefit to accomplishing this task.

Assessing the Telecommunications Merger Wave

A number of observers are questioning whether all this merger activity is good for the economy and for consumers. Some have remarked that the Telecom Act was passed in order to increase competition, but instead we are seeing a merger wave. To the extent that these statements reflect frustration with the fact that developments in the industry have not followed the sequence or the timetable that some of the Act's supporters predicted, they are understandable. As I have said previously before this committee, I believe the Act provides a workable framework that will bring competition to the local market and eventually benefit America's consumers. It will take time, some patience, and a lot of perseverance. We in the Antitrust Division are committed to working hard and going the distance to make the Act fulfill its competitive promise.

To the extent that statements contrasting competition with mergers and restructuring might be interpreted to suggest that the two are somehow inherently incompatible, I would take issue with that suggestion. Mergers can be a natural response by firms in an industry that is undergoing change. And the telecommunications industry is in the midst of not only profound technological change, but unprecedented regulatory change as well. So an increase in merger activity was to be expected in this industry, even in the absence of the larger merger wave taking place throughout the economy. Most mergers and other

business alliances foster efficiency and thus bring increased benefits to consumers and businesses.

Sometimes, of course, a particular merger is incompatible with competition. And it is our job to identify anticompetitive mergers and take whatever remedial action is necessary. We do that by carefully examining each merger on its own particular facts.

We analyze mergers in the telecommunications industry using the same principles that we use in other industries. Essentially, we look to see if the proposed merger would eliminate current competition or future potential competition in a way that harms consumers. We investigate and analyze factors such as market concentration, potential adverse effects, ease of entry into the market at issue, and efficiencies likely to be created by the merger. We do this by a thorough analysis of the information contained from a wide range of sources, including the business plans of the merging parties and other players -- their anticipated methods of entry, the products to be offered, market share projections, and likely impacts on the market.

Our analysis includes looking to see if the merger would lessen innovation in developing new technologies. From the Division's perspective, the ideal competitive environment should enable the development of as many different conduits or points of entry as possible -- be it cable, telephone, wireless, as well as

other emerging technologies -- in order to link people with all kinds of content -- voice, video, and audio, and so on.

Because we are a law enforcement agency, we do not take action to "improve" on a proposed merger, unless we first conclude that the merger as proposed would violate the antitrust laws. We do not have the kind of broad "public interest" standard that the FCC has as a regulatory body when it evaluates proposed mergers within its jurisdiction, which the FCC has interpreted to require that a merger enhance competition in order to be approved. Instead, as a law enforcement agency, we have the burden of proving that a merger is anticompetitive and illegal.

When we do identify an anticompetitive aspect to the merger, we are often able to address it through a focused divestiture or, in some cases, a focused injunctive decree that will remedy the problem while permitting the rest of the merger to go forward, so as not to interfere with activity that does not raise concerns. Sometimes, however, there is no workable remedy short of challenging the merger in its entirety.

Our general approach is reflected in the challenges we have brought to radio mergers over the last two years. There has been significant consolidation in radio station ownership since Congress, as part of the Telecommunications Act of 1996, lifted the regulatory cap on the number of radio stations that could be commonly

owned in a single local market. Prior to that, radio station acquisitions invariably ran up against the regulatory cap before antitrust questions arose. As a result of the new latitude for radio station mergers that the Telecom Act opened up, it became possible for mergers to reach the threshold for antitrust concern before they began to approach the new regulatory cap. Since enactment of the Telecom Act, there have been literally hundreds of radio station mergers for us to review. We concluded that, while the vast majority of them did not raise any antitrust concern, a total of 15 of those mergers would be anticompetitive, and we took action to preserve competition in those matters.

In industries undergoing rapid change, such as the telecommunications industry, it is particularly important that antitrust enforcers be able to consider not only a merger's likely effects on competition now taking place, but also on competition likely to take place absent the merger. This is especially important where competition has been precluded by law in the past, and where technological change is making competition possible where it was not before.

A good recent example of a telecommunications merger challenge in which we are focusing on potential competition is the pending suit we filed last month to prevent Primestar from acquiring the direct broadcast satellite (DBS) assets of News Corp. and MCI. We concluded that the proposed acquisition would allow five of the largest cable companies in the U.S., who control Primestar, to protect

their cable monopolies and keep out new competitors. As you know, DBS is an alternative method of providing multiple channels of television programming to consumers. Under the proposed acquisition, News Corp./MCI would transfer to Primestar authorization to operate 28 transponders at the 110 west longitude orbital slot and two high-power DBS satellites currently under construction. The 110 slot is one of only three orbital slots that can be used to provide high-power DBS service to the entire continental U.S., and is the last position available for independent DBS firms to use or expand into.

As we have alleged in our complaint, high-power DBS is the most serious competitive threat the cable industry has ever faced and, in many areas, is the only significant competitor to cable. Primestar would have no incentive to use the valuable 110 capacity to compete aggressively against cable companies because doing so would "cannibalize" its owners' existing cable subscribers. Thus, acquisition of these assets by Primestar's cable owners would prevent an independent firm from using the assets to compete directly and vigorously with their cable systems. In the end, the transaction would deny millions of American consumers the benefits of competition, including lower prices, higher quality, better service, greater choice, and increased innovation.

No one should presume that our decision not to challenge the Bell Atlantic/NYNEX merger, or the SBC/ PacTel merger, or any other merger, or our

decision to challenge a particular merger, such as the Primestar merger, indicates what our decision will necessarily be with respect to any future merger. We evaluate each merger on its own facts, including the current and likely future state of the affected markets. We believe the antitrust laws are adequate to the task of protecting competition with respect to all mergers, including telecommunications mergers. We believe they strike the right balance in allowing us to stay out of the way of pro-competitive or innocuous mergers, while giving us full authority to challenge anticompetitive mergers when we find them.

Interaction With Other Agencies

As I mentioned earlier, in reviewing mergers in the telecommunications industry, we interact closely -- to the extent permitted by confidentiality laws -- with our colleagues at the FCC, with the State attorneys general, with the State public utility commissions and, increasingly, with our foreign counterparts. We believe this kind of active cooperation is of tremendous benefit to our merger enforcement efforts.

Let me first say a few words about the interaction between the Department of Justice and the FCC. We have had a longstanding and close working relationship with the FCC. Where both the FCC and DOJ share jurisdiction over a transaction, we work together to learn the issues, consistent with applicable confidentiality requirements. We provide the FCC with our competitive analysis,

and the FCC may, if it chooses, condition its license grants on the relief ordered by the Justice Department.

Even though both we and the FCC have a role in analyzing the competitive impact of proposed mergers, our distinct statutory responsibilities and missions are reflected in substantive and procedural differences in our merger reviews. The FCC applies the "public interest" test under the Communications Act**,** while the Justice Department applies the "may substantially lessen competition" test of section 7 of the Clayton Act. Parties seeking FCC approval of a merger have the burden to prove that their merger is in the public interest, which the FCC has interpreted to require proof that the merger will enhance competition, while the Justice Department, as one of the parties in an antitrust enforcement action, has the burden of proof that the merger will substantially lessen competition. And the FCC is an independent regulatory agency whose decisions are accorded substantial deference by reviewing courts, while the Justice Department's views are entitled to no special weight. As a result of these differences, although this has not often occurred, there may be proposed mergers that do not lead to antitrust challenge by the Justice Department but do lead to regulatory intervention by the FCC. Given our somewhat different responsibilities and authorities, both agencies have worked very hard to ensure predictability consistent with our respective roles.

We also work closely with the States, who have enormous responsibilities with respect to promoting competition in their telecommunications markets. The Antitrust Division has placed a very high priority in working closely with State public utility commissions, both in the section 271 long distance entry process and, when permitted by confidentiality constraints, in mergers. In acquisitions of telecommunications carriers with State licenses, in most States the regulators must approve the transfer of the license to the acquiring firm.

We also work closely with the State attorneys general. They not only have standing to enforce Section 7 of the Clayton Act, but many also have authority under State merger statutes. In recent years, we have worked very closely with the State attorneys general in merger matters, producing an unprecedented number of joint and coordinated resolutions. The collaboration with the States has the benefit not only of promoting consistent results and of sharing information, but also of reducing the burden and delay associated with merger reviews.

With increasing frequency, telecommunications mergers have implications for competition and consumers in more than one country or continent, and the Justice Department finds itself reviewing merger transactions and joint ventures that are also being considered by foreign competition authorities. We have endeavored to work constructively with our foreign counterparts -- again, consistent with applicable confidentiality requirements. In the past, we have

worked with foreign antitrust authorities in evaluating other telecommunications transactions, such as the Sprint/France Telecom/Deutsche Telekom joint venture, in which we worked closely on that matter with the European Union and had discussions with the German and French competition authorities. And as press reports indicate, the Justice Department and the European Union are both currently reviewing the proposed MCI/WorldCom merger.

It is our expectation that this trend will continue and accelerate in the wake of the World Trade Organization basic telecommunications agreement concluded a little over a year ago. This historic pact between 68 countries plus the European Union, accounting for more than 90 percent of the world's telecommunications companies' revenues, will open their markets in varying degrees to foreign competition and foreign investment.

Some foreign antitrust authorities have enforcement standards that differ in some respects from ours. Because of these different standards, and because we make our own independent sovereign decisions, there is always the possibility of divergent decisions, such as arose last summer when the Federal Trade Commission and the DG IV of the Commission of the European Communities reached different conclusions with respect to the Boeing/McDonnell-Douglas merger. While that kind of divergence is unique in our experience, we should explore ways to temper any recurrence and, to that end, we and the FTC have been

working closely with DG IV. Given concerns about national sovereignty, navigating these waters -- along with other issues raised by multi-jurisdictional merger review -- will not be easy.

On this point let me emphasize that, notwithstanding the great strides we have made in cooperative merger enforcement with the EC, the Department of Justice makes its own decisions, based on U.S. antitrust law, in all of its matters, independent of the enforcement decisions or interests of the EC or any other foreign competition authority. While cooperation can be very beneficial in cases where two different antitrust authorities are reviewing the same matter, we will not permit such cooperation to affect the independence of federal antitrust enforcement in the United States, with respect to any matter.

Conclusion

The challenges facing the Antitrust Division in staying on top of the enormous merger wave, in telecommunications and throughout our economy, are monumental. The technological complexity and rapid pace of innovation in the telecommunications industry in particular require careful attention to ensure that consumers receive the benefits of a competitive marketplace. Antitrust review of telecommunications mergers presents a multitude of challenging issues. We in the Antitrust Division are committed to meeting this challenge. We appreciate the bipartisan support of this Committee over the years, and look forward to

maintaining our good working relationship to meet the challenges of the coming months and years.